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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91233690
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE BEFORE THE
TRADEMARK TRIAL AND APPEAL BOARD**

Opposition No. 91233690

IMAGE 10

Opposer/Plaintiff,

VS.

Rusty Lemorande

Applicant/Defendant.

Proceeding Number: 91233690

APPLICANT'S PETITION TO DIRECTOR

INTRODUCTORY COMMENT RE FILING DATE OF THIS PETITION

Petitioner notes that per Trademark Rule 2.146(a)(3), a petition from an interlocutory order of the Trademark Trial and Appeal Board must be filed no later than thirty days after the issue date of the order from which relief is requested.

The Interlocutory Attorney filed its interlocutory order on January 15th, 2019. Therefore, per the rule, this Petition is timely filed.

REQUEST FOR STAY

Per Trademark Rule 2.146(g), the mere filing of a petition to the Director will not act as a stay in any appeal or inter partes proceeding that is pending before the Trademark Trial and Appeal Board, nor stay the period for replying to an office action in an application, except when a stay is

LETTER OF PETITION

specifically requested and is granted. Applicant hereby requests a stay of the opposition proceedings pending resolution of the matters described herein.

THE GOOD CAUSE OF THIS PETITION

Previously in this Opposition, Applicant found the Interlocutory's reading and analysis of a fully briefed motion was so wanting that only a Letter of Petition to the Director was appropriate. As a result, the Interlocutory reviewed the motion and reversed much of her earlier position.

Sadly, that is the position Applicant, once again, finds himself in; ergo, this letter of petition.

There are many **glass ceilings** in America suffered historically by women, African Americans, and the old. However, it appears another is emerging - self-represented parties in the U.S. legal system, including the Federal courts and administrative agencies (such as the TTAB). Admittedly largely based on personal, anecdotal evidence, Applicant firmly believes any intelligent and disinterested party upon studying and reviewing important events in the history of this Opposition, especially the most recent order by the TTAB, would find that a *pro se* applicant needs to work multiple times over merely to achieve the same result as a represented party.

Applicant requests and respectfully urges the Director to make such a review and determine for him/herself.

FACTUAL BACKGROUND

A new zombie appears to have risen in this Night Of The Living Dead matter, and it is not the defunct corporation and Opposer, Image 10, which rose about 2 years ago, nearly 50 years after its termination in 1968 (solely, it appears, to initiate this Opposition) but rather, a new zombie - injustice on the part of the TTAB through its agent, the current, new Interlocutory Attorney assigned.

1 Applicant, at first blush in response to the TTAB's most recent order (hereinafter
2 'Order'), believed that a Motion for Reconsideration was appropriate.

3 However, upon careful review, it became Applicant's belief that the Order represented
4 such a near-complete failure to fully read and review (not only the Motion itself but the history
5 of the entire matter), that Applicant concluded that the Director should be made aware of this,
6 not just for the sake of Applicant but, perhaps, for other *in pro per* parties possibly subject to the
7 same lack of fair procedure in the future.

9 In other words, Applicant strongly believes that only upon an experienced and
10 supervisory review can the matter be corrected now and in all Interlocutory matters going
11 forward in this Opposition.

12 It is possible that the apparent recent change of assignment of an Interlocutory Attorney
13 (hereinafter, IA) occasioned this result. If this is the case, Applicant respectfully points out 1)
14 this change is not the fault of Applicant, and 2) merely recognizing this change is not a remedy.
15 Applicant is not suggesting that justice is disserved by the use of new staff attorneys (if that is
16 the case here), but that there is a miscarriage when an apparently incomplete review in a serious
17 matter such as a TTAB opposition proceeding occurs and is then relied upon.¹

18 **THE RECENT TTAB ORDER**

19 The IA, in her Order, states:

20
21 *"Based on the foregoing, it does not appear that Applicant provided Opposer with a*
22 *meaningful opportunity to resolve the parties' dispute prior to seeking Board*
23 *intervention."*
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27 ¹ Applicant recalls a medical professor once telling him that new, young doctors, upon graduating, are
28 told to 'go out and kill a few patients', recognizing that such unfortunate patients are a necessary part of
the educational process to benefit all society. Perhaps, that is true in law as well, and, if so, Applicant
asks the TTAB that he not be deemed such a patient.

1 Applicant, on several readings, still cannot find a way to reconcile this statement with the
2 facts as briefed which include thirteen steps taken by Applicant towards resolution prior to filing
3 the Motion.

4 In order to make this as evident as possible, Applicant has taken not inconsiderable time
5 to generate a timeline, inserted below, indicating the many actions Applicant took to resolve the
6 matter without the need of TTAB intervention. Applicant's actions are listed in the top box;
7 Opposer's beneath, and the bottom section indicates TTAB events. Note, also, symbols for
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telephone calls and emails.



1 Please note, the TIMELINE above is also attached as Exhibit Eleven to aid in viewing, if
2 necessary.

3 The following is a summary of the timeline above:

4 1) On May 14th, 2018, Applicant emailed Opposer stating legal support for Applicant's
5 contention that Tax Returns and Financial Data was appropriate for Discovery.

6 *(Opposer does not respond after THREE MONTHS and One Week.)*
7

8 2) Therefore, on August 28, 2018, Applicant, wishing to follow the TTAB's order,
9 emailed Opposer with a request for a MEET and CONFER, including talking points
10 for that discussion.

11 *(August 28, 2018: Opposer responds and suggests a call at the end of the week.)*
12

13 3) August 29, 2018: Applicant, concerned with time emails Opposer, proposing next
14 day.

15 4) August 30, 2018: Failing to get a response from Opposer, Applicant emails again.

16 *(August 30, 2018: Opposer emails Applicant, requesting call be the following day.)*
17

18 5) August 30, 2018: Applicant emails Opposer, confirming date for call.

19 6) August 31, 2018: Applicant telephones Opposer at appointed time. At the beginning
20 of the call, Opposer declines any discussion, stating will be withdrawing that day.

21 7) August 31, 2018: Applicant emails Opposer, confirming prior discussion and
22 withdrawal of Counsel for Opposer. Applicant also proposes a joint stipulation.

23 *(Sept 1, 2018: Opposer says would 'be fine' to receive draft stipulation).*
24

25 **SEVEN DAYS OF SILENCE ENSUE WITH DISCOVERY CLOCK TICKING**
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- 1 8) Applicant emails Opposer again, asking why there has been no filing of withdrawal.
2 *(Opposer emails in reply, saying has been 'backed up', and asks that a draft*
3 *stipulation be sent to Counsel for Opposer.*
- 4 9) Sept. 10, 2018: The next day, Applicant drafts stipulation and emails to Opposer.
5
6 10) Sept. 11, 2018: Given no response from Counsel for Opposer, and concerned with
7 discovery clock ticking, Applicant emails again asking if Opposer will sign
8 stipulation or amend.
9 *(Opposer replies that day, stating has 'many cases', and not ignoring Applicant.)*
- 10 11) Sept. 12, 2018: Applicant responds, stating concern that the TTAB is not aware of the
11 above.
- 12 12) Applicant responds, appreciating Opposer's courtesy, but given two weeks have
13 passed since Opposer stopped call to TTAB, Applicant suggests a three-way
14 conference with TTAB, as ordered by them, and initially attempted by Applicant.
15
- 16 13) Applicant resends prior email to ensure delivery, given its importance.
17
- 18 14) Applicant inquires re silence from Counsel for Opposer.
19
- 20 15) Still hearing nothing from Counsel for Opposer, Applicant places urgent telephone
21 call to Counsel for Opposer, and leaves detailed voice message.
22
- 23 16) Email sends a confirming email, detailing the voicemail, and stating that if Applicant
24 receives no response, Applicant will be filing a motion with the TTAB so that it is
25 aware of the above.
26
- 27 17) 39 DAYS SINCE OPPOSER STOPPED CALL TO TTAB CLAIMING IT WOULD
28 WITHDRAW THAT DAY OR WITHIN A FEW DAYS, AND 38 DAYS SINCE
DRAFT STIPULATION WAS SENT TO OPPOSER, Applicant finally files a
Motion with the TTAB.

- 1 18) Applicant also took the time (which was not trivial and, frankly, unnecessary, given
2 the prior written arguments Applicant had sent to Opposer, a document never
3 responded to in any meaningful way) to email a list of issues in advance of the call to
4 be discussed during the meet and confer, hoping that discussion would be fruitful and
5 finally resolve the matter. Please note Opposer wrote no such helpful document nor
6 showed the interest or courtesy to even respond at any subsequent point
7 acknowledging mere receipt of the document.
- 8 19) When the call finally occurred, as previously briefed to the TTAB, at the very
9 introduction, Opposer announced that no discussion was to be had, claiming this was
10 because counsel was withdrawing that very day or no later than early the next week.
- 11 20) However, Counsel actually did not withdraw - not that day or within a few days or
12 for two and a half weeks after many requests by Applicant, and only after Applicant
13 was forced to file his motion.
- 14 21) Early in this interval, Applicant took the time to draft and send a proposed stipulation
15 for Opposer's review, understanding there could be further proposed changes and
16 ultimately a signature.
- 17 22) Counsel again disappeared, ghosting Applicant by failing to respond to any inquiry -
18 email or telephone.
- 19 23) Applicant, understandably concerned that his discovery window was closing quickly,
20 especially given Opposer's historical last-minute tactics (a matter of earlier motion
21 practice) presumably enacted to prevail in the Opposition solely through procedural
22 maneuvers rather than on the merits of the case, attempted to reach Opposer
23 continuously. Again, silence in all forms ensued.
- 24 24) Understandably fearing that Opposer or the TTAB would declare a waiver on
25 Applicant's part, Applicant responsibly filed the motion to which this order pertains.

26 (PLEASE NOTE: The Evidentiary Exhibits proving the above, previously attached to
27 the original motion by Applicant, are reattached now for the convenience of the
28 Director.)

RE: THE TIMELINE

1 Upon review, you will see that Applicant's actions prior to filing his recent motion total 16,
2 Opposer's merely 5. In addition, and perhaps more persuasively, please note the horizontal bars
3 that indicate the amount of time passing - a clock rapidly ticking on Applicant's discovery
4 window - during which Opposer became obstructively non-responsive, and at times completely
5 silent despite multiple varied attempts by Applicant to communicate.

6
7 Millennials call these silences 'ghosting'. No one likes it; Applicant clearly did not, and
8 such a tactic seems legally inappropriate in the midst of a TTAB opposition.

9 What Applicant finds especially egregious in Opposer's many egregious actions (through
10 its then-counsel) is its statement to the TTAB:

11 *"Unfortunately, Applicant **did not want** to provide Counsel and Opposer a reasonable*
12 *opportunity to file the application [sic] for withdrawal. **Applicant instead insisted** on a*
13 *motion to compel."* [Emphasis added].

14
15 First of all, it appears very unlawyerly to posit that it knows Applicant's 'wants' let alone
16 anyone's. That is the realm of psychics, if that skill truly exists. Speculation is fine, and
17 Applicant occasionally speculates as to Opposer's true motives, but stating that Applicant 'did
18 not want' is inappropriate, inadmissible and, frankly, silly. Almost as questionable is Opposer
19 stating that 'Applicant insisted'. Unless Opposer is quoting a statement by Applicant, such word
20 choice is inappropriate as well.

21
22 Additionally, Opposer, in its most recent filing, states, pertaining to Applicant's request
23 for tax returns that:

24 *"...Applicant has provided no justification for such materials."*

25 This is patently untrue, as will be seen by the Director if he or she reviews the past filings
26 in this matter. Applicant properly researched the topic and then provided Opposer with case
27 citations and other supporting evidence (provided as an **Exhibit One**, email sent on Feb 23,
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1 2018). Other Exhibits pertaining to Applicant's many efforts to resolve the tax return matter (all
2 previously submitted within a motion) are again attached as **Exhibits Two** (March 7, 2018),
3 **Three** (March 13, 2018) **Four** (March 20, 2018), **Five** (March 23, 2018), **Six** (April 26, 2018),
4 **Seven** (May 2, 2018), and **Eight** (Aug 28, 2018).

5 Opposer failed to respond, and now, worse, claims no such information was sent,
6 representing a clear falsehood propounded to the TTAB.

7 The obvious speciousness of such statements, including those described and examined
8 above, given the entire history of events, is distasteful, at least to Applicant who submits that
9 these misleading and often false statements to the TTAB are sufficient grounds for the sanctions
10 requested.

11 It is beyond Applicant's imagination as to how the IA could conclude, based on the fully
12 briefed and described 14 time-consuming steps taken by Applicant above, that Applicant did not
13 provide Opposer with:

14
15
16 *'... a meaningful opportunity to resolve the parties dispute prior to [Applicant]*
17 *seeking Board intervention'*

18 This assertion is, frankly, at least to Applicant, stunning. Applicant sincerely wonders what 14th
19 step the TTAB, through its agent, the IA, would suggest. Perhaps the director can do so.

20 **CONTINUING CONCERNS RE THE TTAB'S INTERLOCUTORY ATTORNEYS'**

21 **POSSIBLE DISRESPECT FOR SELF-REPRESENTED PARTIES**

22 Applicant feels he has good reason to worry that the TTAB is possibly treating this in pro per
23 matter with little more than a cursory read of Applicant's Opposition defense, or worse - a
24 determination to resolve and get rid of this matter without fair discovery or due process.

25 Somewhat recently, noted 7th Circuit Appellate justice, Honorable Richard Posner,
26 described in his book written to explain his reason for quitting that distinguished bench, the
27
28

1 unfair treatment of self-represented parties in Federal matters. Applicant worries, as described in
2 his prior Petition to the Director, that is again the case.

3 Judge Posner stated in a N.Y. Times article ²discussing his book regarding self-
4 represented parties:

5 **“The basic thing is that most judges regard these people as kind of**
6 **trash not worth the time of a federal judge.”**

7
8 It that article, Judge Posner then states the general reason for his retirement. Per the
9 interviewer:

10 **“He had become concerned with the plight of litigants who**
11 **represented themselves in civil cases... Their grievances were real, he**
12 **said, but the legal system was treating them impatiently, dismissing**
13 **their cases over technical matters.”**

14 Applicant feels his concerns are justified that despite attending to the Opposition with full
15 diligence, including research of the TTAB rules and prior cases, his defense is being impatiently
16 dismissed over technical matters. Applicant prays the Director show the error of this perspective.

17 To be fair, the Order is not, in its entirety, disrespectful of or disinterested in Applicant’s
18 requests. The continuing, boilerplate arguments made by Image 10 as to why its business
19 information is sacred and not available in the very Opposition it initiated, caused an order for a
20 privilege log, a standard item, something, frankly, that should have been provided two years ago,
21 being a discovery requirement any licensed attorney appearing before the Board would know
22 without admonition and instruction.

23 **CONFUSION IN INTERPRETING THE ORDER**

24
25 Confusion occurs when the I.A. states:

26
27 ² An Exit Interview With Richard Posner, Judicial Provocateur; Adam Liptak, New York Times, Sept. 11,
28 2017

1 *“Opposer’s counsel noted that he was planning to withdraw his representation and*
2 *rather than file the agreed to suspension of deadlines or to otherwise extend or*
3 *suspend proceedings, Applicant filed the instant motion to compel. “*

4 Adding a required dash and converting this to two sentences makes the content understandable,
5 at least to Applicant:
6

7 *“Opposer’s counsel noted that he was planning to withdraw his representation.*
8 *Rather than file the agreed[-]to suspension of deadlines or to otherwise extend or*
9 *suspend proceedings, Applicant filed the instant motion to compel.”*
10

11 In reply, Applicant first asks what was the ‘agreed-to suspension of deadlines’? Is the IA
12 referring to the draft stipulation proposed by APPLICANT alone, one Opposer refused to read
13 and revise (if necessary), let alone sign and return? Although Opposer did agree to the idea of a
14 stipulation, one solely to the benefit of Opposer and the TTAB (avoiding another Motion to be
15 drafted then read by with a subsequent Order from the TTAB), Opposer’s refusal to even
16 respond to the draft, revise or sign so that it could be timely filed with the TTAB, makes it clear
17 that no suspension/stipulation was ever ‘agreed to’.
18

19 Perhaps Applicant is mistaken, but he found, after careful review, that nothing in the
20 TTAB Rules provides for filing such an ‘agreed-to suspension of deadlines’ when nothing was
21 ever agreed to or even discussed despite numerous efforts by Applicant.³
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26 ³ For the avoidance of confusion, as stated, the call to Opposer was cut short by Counsel declaring he
27 was no longer representing Opposer. Therefore, no terms for a stipulation were ‘discussed or agreed
28 to’. Applicant did later propose terms and a timeframe in his drafted stipulation but, as has been already
stated, a response – either of agreement or disagreement - from Opposer was never forthcoming.

1 Given the long history of difficult interaction with Opposer's counsel (often hostile to
2 Applicant as the Director will see in the prior motions and their exhibits) and the refusal of
3 Opposer's counsel to return a call, respond to e-mails or discuss anything substantive or
4 meaningful, Applicant had reason to believe that the promised by yet unfiled Withdrawal or even
5 Intent to Withdraw was just another tactic to ensure the discovery period would run and then
6 expire without any meaningful response to discovery ever having been provided by Opposer. In
7 other words, Opposer either had no intention of filing his withdrawal as promised, or reviewing,
8 commenting (if necessary) and then signing the proposed stipulation without prejudice to
9 Applicant or, in the alternative, Opposer was so egregiously negligent that the same damaging
10 result would likely have occurred - a finding that Applicant had waived his right to further fair,
11 and proper and Constitutional mandated and discovery.⁴

12
13 Had Applicant not filed his Motion - the one the I.A. clearly complains of - more time
14 would have passed, leading to likely waiver, one unnecessary, unfair, and unacceptable.

15
16 The IA also states in its order:

17 *"Applicant could have filed a motion to suspend or extend deadlines without*
18 *Opposer's consent, noting Opposer's counsel had indicated his plans to withdraw his*
19 *representation of Opposer."*

20 To this comment, Applicant first asks: 'A motion filed for what purpose?' It seems that
21 such a motion would merely give Opposer more time to avoid the matter and further prejudice
22 Applicant in his bona-fide business intentions, dealing a further dilatory blow in an Opposition
23 filed by Image 10, a deceased company for 50 years, causing a legal proceeding now two years
24 in the making WITHOUT ONE DOCUMENT PRODUCED!

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26
27 ⁴ In the hope the Director will take the time to review the fully briefed motions in the history of this
28 Opposition, the Applicant also notes Opposer continuously 'gamed' the process, repeatedly filing non-
responsive and/or useless responses, playing with time frames and other tactics, as noted by the TTAB
itself in its Orders, rather than just complying with the customary and unremarkable discovery requests.

1 It also makes no sense why both the TTAB and Applicant should be jointly subject to
2 Opposer's whims, delays, deceptions or negligence, as the case may be. If Opposer was not
3 willing to sign a stipulation informing the TTAB of the status of the Opposition, or a simple
4 withdrawal (basically a form motion with one inserted paragraph requiring less than two minutes
5 to compose, one stating a commonplace and mundane reason for withdrawal (i.e. the non-
6 payment of fees), why would Applicant be the proper party to 'buy more time' for the negligent
7 Opposer, one whose tardiness and failure to provide discovery despite three orders from the
8 TTAB over two years has already dragged this Opposition further than reasonable or necessary?

10 In other words, Applicant is not the scheduling assistant for Opposer, and there is nothing
11 in the Rules that requires or even suggests otherwise.

12 Moreover, if Applicant were to file such an ex parte extension of deadlines on behalf of
13 the 'too busy' Opposer, what amount of time would be appropriate to insert in the request?
14 Perhaps something like:

16 '...Until Opposer no longer is too busy to speak on the phone, or read and revise if
17 necessary, and then sign a simple joint stipulation drafted and sent by Applicant'?

18 Or, is the IA suggesting that Applicant expend more of his own time (clearly not as
19 valuable to Counsel for Opposer as is his own time) in an attempt to reach Counsel for Opposer
20 who, if he even elected to actually respond (as he hadn't at that point) Applicant might
21 obeisantly then ask,

23 'How much time should I ask to extend so you have an opportunity to make this
24 case a priority in your busy practice - I, of course, not being busy - so you may find
25 a few minutes to determine when you'll later have 10 minutes to file your
26 withdrawal or read and approve and sign a simple stipulation?'

27 On this basis, the TTAB's above suggestion, at least to Applicant, makes no sense.
28

1 Additionally, the IA states:

2 *“Because Applicant did not obtain prior Board approval and because Applicant*
3 *did not exercise the requisite good faith effort before filing the motion to compel,*
4 *Applicant’s motion to compel is denied.” [Emphasis added].*

5
6 Again, the IA creates a circularity, one impenetrable and incapable of uncoiling, at least
7 to Applicant. Since no two-way call could be achieved (given Opposer’s objection based on its
8 imminent withdrawal), obviously no three-way call with the TTAB could be achieved either (for
9 the reasons stated in this and the prior motion), how does the IA suggest obtaining ‘prior board
10 approval’ prior to filing a motion? There was nothing in the TTAB’S prior order providing for
11 this circumstance, nor does any section of the Rules describe and then regulate this. Perhaps the
12 IA believes that Applicant, should have called the IA directly, ex parte. But, given the history of
13 the Orders on this matter which shone a stark and sharp spotlight on the in pro per applicant to
14 know the TTAB rules and technicalities well, perhaps better than many practicing attorneys,
15 Applicant, therefore, worried of the consequences of not following the rules exactly, or being
16 perceived as disobeying the prior order. Perhaps, therefore, the Director will understand why
17 Applicant, failing to find such instruction within the Order or the TTAB Rules, would not even
18 consider being inventive at this point. Applicant again recalls Judge Posner’s N.Y. Times where
19 it states:
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21
22 **“... [The self-represented parties’] grievances were real, [Judge**
23 **Posner] said, but the legal system was treating them impatiently,**
24 **dismissing their cases over technical matters.”**

25 Perhaps the IA or the Board itself believes since this is an in pro per defense to an
26 Opposition filed by Image 10 (despite Applicant’s application being approved for publication
27 after proper review by a TTAB examining attorney), the Applicant has no personal and authentic
28

1 ability to pursue the business activities for which an ‘intent to use’ application exists. Moreover,
2 perhaps there is an assumption that since an attorney has not been engaged by Applicant, no
3 business can truly be conducted, the intent to use application being merely a costly lark.

4 For the record, although Image 10 has produced only one motion picture (admittedly a
5 classic) over a half-century ago, then almost immediately shuttering its doors.⁵), Applicant has
6 professionally contributed to 13, including producing nine major motion pictures, several with
7 Academy Award winning directors, three already considered classics. He is a Golden Globe
8 Winner and the writer of an Academy Award Nominated screenplay. Applicant has also written
9 scores of screenplays commissioned by the major studios and television networks, as well as
10 written and directed high-profile MTV-style videos with artists such as Luther Vandross and the
11 Culture Club. In other words, Applicant’s business intentions are authentic and supported by a
12 professional history.

13 **AS TO A “LACK OF IMPASSE”**

14 The IA states confusing in the Order,

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16
17 *“Indeed, the apparent lack of impasse indicates that Applicant’s efforts toward*
18 *resolution were incomplete and insufficient.”* [Emphasis added]

19 Applicant finds himself at a loss to understand this sentence, starting by Applicant pondering
20 what constitutes the double-negative: a ‘lack of impasse’? Do unreturned or non-productive
21 phone calls, emails never responded to, a unilateral election not to speak with the TTAB in a
22 three-way conference call, and other listed events above equal a complete and utter failure
23 ‘incomplete and insufficient’ efforts to respond and communicate; do they not represent an
24 ‘impasse’, especially considering this is not a matter of one event but a bundle – and a large one –
25
26
27

28 ⁵ By ‘shuttering its doors’, Applicant, hopefully obviously, means terminating the entity.

1 transpiring over a critical period of time as an important clock is ticking (not only as to discovery
2 deadlines but to a bona fide business plan for which the ‘intent to use’ application was first filed?

3 Applicant cannot deduce the meaning of or any accuracy within the above sentence from
4 the TTAB Order, and sincerely doubts that the Director will be able to.⁶

5 **APPLICANT’S PURPORTED FAILURE TO COOPERATE**

6
7 The IA, in her order, states:

8 *“Given the tenor of the parties’ filings, it is clear that the parties have failed to*
9 *cooperate with one another in the discovery process.”* [Emphasis added]

10 Rather than elaborate in rebutting this stunning statement, Applicant will rely on the
11 Director’s assessment in his or her review of the timeline of events revealing clear and
12 unequivocal proof that Applicant has in no way ‘failed to cooperate’, and that, in fact, Applicant
13 has gone the distance-and-more in unnecessary expenditures of time in order to resolve the
14 matters despite Opposer’s near-constant obstruction and game-playing, a procedure already
15 noted by the TTAB in prior orders.

16
17 Please see the attached **Exhibit TEN** (11, May 2, 2018) in which Counsel for Opposer
18 actually states that he and Opposer will no longer communicate with Applicant.

19 **AS TO THE DISCOVERY WINDOW**

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21
22 ⁶ In this footnote, perhaps more important than much of the main text, Applicant points out the directive
in a prior Order by a different IA, in which she states:

23 *“A motion to compel must be supported by a written statement that the moving party has*
24 *made a good faith effort, by conference or correspondence, to resolve with the other party or*
its attorney the issues presented in the motion, and has been unable to reach agreement ...”

25 *“... It was incumbent upon Applicant, prior to filing his motions, to make at least one*
26 *additional inquiry. See Hot Tamale Mama, 110 USPQ2d at 1082 (finding single email*
exchange between the parties insufficient to establish good faith effort). “

27 Applicant now asks the Director, given the admonition by the current IA, who finds that inquiries far more than two
28 in number still aren’t sufficient, just when will the goal post in this matter stop moving?

1 Since there is nothing in the Order stating a revised Discovery schedule, and more time has been
2 expended waiting for Image 10 to decide its representation and then register such change with
3 the TTAB, Applicant is at an understandable loss as to what the discovery deadlines are (within
4 which documents yet remain unproduced followed by reasonable time to review, and then, if
5 necessary, conduct depositions) or, worse, Applicant wonders if, because of Opposer's actions
6 (and the IA's order), discovery is now deemed closed.
7

8 Therefore, Applicant kindly requests that the TTAB provide the current expected timeline
9 and deadlines for the mutual benefit of both Applicant and Opposer.

10 **THE FAILED CONFERENCE CALL ATTEMPT**

11 Given the importance of the call Applicant requested of Opposer, scheduled and then
12 commenced, faithfully honoring the TTAB's order to do so prior to engaging the TTAB in the
13 ongoing discovery morass, Applicant documented the call with a third-party. Applicant hereby
14 attaches a declaration reporting in detail the conversation within that call. This detail clearly
15 refutes much of Opposer's assertions on this matter.
16

17 Please see **Exhibit NINE**, attached, which is that declaration.

18 **OPPOSER'S SUBSEQUENT WITHDRAWAL 'PING-PONG'**

19 It could be mere coincidence, negligence, or cunning gaming that counsel's August 31, 2018
20 telephone statement that it no longer represents Opposer, precluding a three-way call to the
21 TTAB when it is strategically favorable to Opposer, suddenly curiously occasions representation
22 by the same Counsel to rise from the dead, in order to file another useless response to documents
23 requested. Applicant should not be further prejudiced by this zombie-like action, and respectfully
24 asserts it bolsters grounds for sanctions of some form.
25

26 In short, and as the Director will see if choosing to reviewing the entire history of this
27 matter, Applicant has repeatedly bent over backwards throughout the Opposition procedure to
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1 accommodate Opposer, first by not objecting to its tardy submission in an initial instance, and
2 including, most recently, by Applicant himself proposing additional time to enable Opposer to
3 decide whether it would self-represent or find new counsel.

4 Such actions by Opposer have prejudiced Applicant both in this proceeding and in his
5 bona fide business pursuits.

6
7 **A RESTART WOULD SEEM UNFAIR TO BOTH APPLICANT AND THE TTAB**

8 Should Opposer choose to engage new counsel, it would not be fair to Applicant or the TTAB
9 (whose resources are also limited) that Opposer be allowed to, effectively, start anew.

10 Presumably the TTAB concurs with a common legal principle, known by lawyers and many
11 laypeople, that a party is bound by the actions of its agent (here, counsel for Image 10).

12 Therefore, it would be a miscarriage of justice and universal fair dealing that any new counsel be
13 allowed a second bite at the discovery apple.

14
15 In other words, Applicant believes the basis for Applicant's Motion for Sanctions should
16 be decided based on historical facts only, not current or future attempts at proper and fair
17 opposition practice.

18 **OPPOSER'S CURRENT REBUTTAL TO CRITICISM OF ITS PRIOR PRACTICES**

19 Given this topic has been fully briefed previously, Applicant points out now, merely as
20 examples, that Opposer has repeatedly ignored or violated the TTAB's position on discovery
21 matters. For example, the TTAB twice stated the need for a privilege log. However, both times
22 that instruction was ignored. In another instance, after Opposer stated, in its response to a
23 document request, that certain documents would be produced '*if found*', the TTAB instructed
24 this was not an appropriate response. Nevertheless, Opposer restated that same 'response'
25 subsequently and repeatedly.
26
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1 Applicant hopes that if the Director examines the history of the motion practice in this
2 Opposition, he or she will note the above.

3 Applicant also respectfully asks that the Director consider the following speculation, suggesting
4 a motive (although improper) for Opposer's harmful, dilatory behavior (through its counsel)
5

6
7 It would seem that since Counsel was no longer being paid, he felt no duty to either his client or
8 even the TTAB, and certainly not to the Applicant.

9 However, as Applicant understands it, the **Rules of Professional Responsibility** require
10 a continuing duty to Image 10, and Counsel's position as an attorney makes him an **Officer of**
11 **the Court** (which, presumably, includes the Federal system including the TTAB), therefore, with
12 a perpetual duty to the TTAB.

13
14 As a result of Counsel's behavior (and this, again, is an opinion by Applicant although
15 based on the factual history), Counsel's failure to attend to this matter has caused many hours of
16 unnecessary and uncompensated research and work in the preparation and writing of this letter,
17 as well as many resources of the TTAB, again, an unnecessary expenditure.

18 **A WORST-CASE SCENARIO**

19 If Applicant's worries are correct regarding the TTAB's attitude towards a self-represented
20 defense to an Opposition, (even if merely subconscious as Judge Posner suggest in his book),
21 Applicant asks that the TTAB show that hand now, whether intentional or subconscious, so that
22 Applicant can decide the best course of action going forward.
23

24 It seems reasonable to state that a simple Opposition, involving businesses operating with
25 standard procedures, taking what is now two years with not one document produced and,
26 therefore, no depositions taken, or supplemental discovery requested, is far too long by any
27 reasonable standard. With no apparent exceptions, the dilatory gaming falls squarely on the
28

1 shoulders of the Opposer, and, therefore, Applicant prays the Director will cause the recently
2 dismissed motions to be given a fair review. To not sanction these prior practices (and their
3 harmful and costly consequences, both to Applicant and the TTAB) in some form seems,
4 certainly to Applicant, to be a miscarriage of the TTAB's basic mission, in particular, and justice
5 in general.⁷

6
7 In addition to the ghosting described in Applicant's most recent motion, and summarized
8 herein, Applicant would like to point out to the Director something the current IA apparently
9 didn't note - the same, chronic behavior described in Applicant's prior Petition to the Director. In
10 other words, those events should be added to the tally in determining if sanctions are appropriate.

11 The section within the prior Petition (**11 TTAB Pg. 2**) reads as follows:

12
13 *"Applicant, in all three of his motions to compel, provided proof of THREE prior email*
14 *requests to Opposer that received no response whatsoever, either by phone, mail or*
15 *email. (See Exhibits A, B and C in each of Applicant's Three Motions to Compel). Two*
16 *of those email requests stated problems with the various responses to discovery*
17 *requests by Opposer, and, therefore, requested 'meet and confer' conferences. None of*
18 *these emails were responded to by the Opposer, as Applicant pointed out to the*
interlocutory attorney. As of this filing, there has still been no response from Opposer."

19 **CONCLUSION**

20 In summary, Applicant believes that the silence and stonewalling perpetrated by the Opposer is
21 counterproductive to the system designed to assess competing claims of right, and that such
22 stonewalling is being, perhaps unwittingly, endorsed and aided by the IA's order.
23
24
25

26
27 ⁷ As briefed in the Motion, it appears that Opposer may have caused these delays in order to raise
28 money by advertising the mark improperly to the public, harming them, the public being the primary if
not sole beneficiary of Trademark law. Applicant hopes the Director, or his or her delegate, considers
this matter in its decision.

1 As stated in the original Motions and this document, Opposer did not nor has since
2 responded to TWO REQUESTS to MEET AND CONFER regarding discovery disputes, ONE
3 INQUIRY as to failed discovery transmission, and ONE INQUIRY as to DEPOSITION DATES.

4 In addition, if the Interlocutory Attorney's position is sustained, it would appear that
5 Applicant's attempts at fair and necessary discovery are and will always be futile, possibly
6 because of his Pro Se status. Applicant is obviously deep into the opposition process (one
7 initiated, for the record by the Opposer, not by Applicant), and, therefore, clearly past the
8 'intention' and 'apparent' stage, having already consumed voluminous hours of research,
9 analysis, thought and writing constituting more than 45 pages, in the aggregate, of reasoned and
10 researched arguments) all of which Applicant asserts has been professional, diligent and
11 trustworthy.
12

13 Applicant believes the decisions stated in the Interlocutory Attorney's order leave him
14 with no other apparent option - in pursuit of fairness in the opposition process - other than this
15 Petition, especially as it seems that Applicant's pro se status has prejudiced the IA against nearly
16 all of the content in Applicant's motions.
17

18 Therefore, Applicant respectfully requests that the Commissioner require reconsideration
19 of the previously submitted motions, and, thereafter, issue a revised order, or, in the alternative,
20 transfer the matter to another interlocutory attorney.
21

22 Applicant respectfully asks that the Commissioner notice that Opposer's behavior in the
23 discovery process to date has been to deny the provision of any evidence to support Opposer's
24 claims, depriving Applicant of essential information to defend Applicant's application or
25 abandon it, perpetuating a TTAB action that should and could be resolved if such evidence of
26 superior rights owned by Opposer actually exists. As a result, both Applicant's and the TTAB's
27 time, effort and resources are possibly fruitless and wasted.
28

1 Colleagues in the legal profession have told me that this petition is pointless, or worse, it
2 will prejudice the Board even further against me, given the understandable collegiate nature of
3 the TTAB, and all organizations in general.

4 If so, so be it. But Applicant would like to believe the mantra that ‘we are a nation of
5 laws’ and that, therefore, the Director will adjudge this matter fairly and dispassionately
6 regardless of whatever inter-employee awkwardness might later ensue within the TTAB.
7

8
9 Respectfully submitted,

10
11 /Rusty Lemorande/
12 Rusty Lemorande
13

14 Dated February 11, 2019
15 Respectfully submitted,
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CERTIFICATE OF SERVICE AND FILING

I hereby certify that a copy of the foregoing Petition to Commissioner was served on current counsel for Image 10 LLC prior to release by the TTAB, by e-mailing said copy, as agreed by counsel, on February 11th, 2019, to the following email address: Michael Meeks at mmeeks@buchalter.com, Farah Bhatti at fbhatti@buchalter.com, and hblan@buchalter.com,

And,

Christopher P. Sherwin, forthcoming counsel upon approval by the TTAB, by e-mailing said copy, as agreed by counsel, on February 11th, 2019, to the following email address: CSherwin@webblaw.com,

And

So there are no disputes as to receipt during the current, interim period, to Image Ten, as current self-represented party, on February 12th, 2019, to the following address, First class postage prepaid: IMAGE TEN, INC. CORPORATION, 216 EUCLID AVENUE GLASSPORT PENNSYLVANIA 15045

/Rusty Lemorande/

Rusty Lemorande

LETTER OF PETITION